Supreme Court, U.S.
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No. 92-1696

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1992

JESSE L. COOK,
*Appellant,*
v.
CHRYSLER CORPORATION, a corporation, and LOCAL 110, UNITED AUTOMOBILE, AGRICULTURAL AND IMPLEMENT WORKERS OF AMERICA (UAW),
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## RESPONDENT CHRYSLER CORPORATION'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Eighth Circuit held that Chrysler was not required to take steps inconsistent with non-seniority based provisions in an otherwise valid collective bargaining agreement to accommodate Petitioner's religious practices (regardless of whether such an accommodation would result in undue hardship), and thereby created a direct conflict among the circuits on an issue of special importance to the administration of justice and/or the public?

2. Whether the Eight Circuit held that the existence of an otherwise valid collective bargaining agreement containing a non-discriminatory seniority system or some other neutral method for scheduling may be deemed a substitute for the active effort by the employer to seek a reasonable accommodation of an employee's religious practices, and (regardless of the Eighth Circuit's holding that Cook's practices could not be accommodated without undue hardship) thereby created a direct conflict among the circuits or otherwise created a special and important reason for granting certiorari review?

3. Whether the Court should review this case to determine whether the lower courts must follow the EEOC Guidelines On Religious Discrimination in determining what constitutes *de minimis* cost and undue hardship, and to determine whether any costs incurred by the employer must be quantifiable?

4. Whether the Court should review the record and factual and legal findings of this case to determine if, as a matter of fact, Chrysler refused to use the same accommodation means for one Sabbatarian which were allegedly used for another Sabbatarian or were allegedly used for employees who seek a scheduling accommodation for a secular reason?

## PARTIES TO THE PROCEEDING

The parties to this proceeding below were Jesse Cook, the petitioner, and the respondents Local 110 of the United Automobile, Aerospace And Agricultural Implement Workers of America (UAW) and Chrysler Corporation. Chrysler is a corporation whose shares are publicly-traded. Chrysler has no subsidiaries which are not wholly-owned except the folowing entities:

Acuflight, Inc.
American International Rent A Car
Arab American Vehicles Company
Automation Technologies Products
Beijing Jeep Corporation, Ltd.
Big Sky of Montana Realty, Inc.
CFC/GECC (New York) Associates II
Chrysler Japan Sales Limited
City Rentals (Holdings) Limited
Eagle Associates
Ensambladora Carabobo, C.A.
Eurostar Gesellschaft m.b.H. & Co. KG
Eurostar Gesellschaft m.b.H.
F. F. Developments Limited
Flightform Limited
Genigraphics Corporation
Highland Park Development Corporation
Kingmill (Australia) Pty Limited
Lease-It Corporation
Mahindra & Mahindra, Ltd.
Manufacturers Hanover Asia, Limited
Mitsubishi Motors Corporation
Motor Club of America
Obsidian Livery, Inc.
OEM S.p.A.
Onset Bidco, Inc.
Phillips and Acustar Autoelectronics GmbH
Phillips and Acustar Autoelectronics, GmbH Co. KG
Pinnacle Partners

Rambler Motors (AMC) Limited
Rolls-Royce & Partners Finance Limited
Star Group IE Geothermal Partners
Star Group Stillwater Geothermal Partners
Synektron Corporation
Trico Marine Operators, Inc.
Valeo/Acustar Thermal Systems, Inc.
Wizor, Inc. of

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## STATEMENT OF THE CASE

Cook's petition for certiorari portrays the facts of this case in a somewhat distorted and incomplete manner. The principal problem with Cook's version is that it fails to place the events in proper context or clearly identify the witnesses involved and their relationship to the events. The following discussion accordingly is presented to place the issues in proper context and provide the Court with a clearer understanding of the underlying facts and the difficulties involved with Cook's request for accommodation. Chrysler also refers the Court to the detailed factual findings in the District Court's opinion, which provide a far more complete and accurate portrayal of the facts than Cook suggests.

### Chrysler

At all relevant times during this case, Chrysler operated two separate vehicle assembly plants in St. Louis, Missouri—St. Louis Assembly Plant I and St. Louis Assembly Plant II (which opened in 1983 and employs approximately 3,200 production workers). Chrysler's Appendix ("SA") 242, 251, 460. The production and maintenance workers at each plant were represented by the International Union, United Automobile Aerospace & Agricultural Implement Workers of America (UAW) (the "UAW" or the "Union") but each plant was represented by a different local of the Union. A. 18. Local 110 of the UAW represents the production workers at Plant II. SA 213.

### Chrysler and the UAW

Chrysler and the Union are parties to a national collective bargaining agreement which governs the terms and conditions of employment for production workers at all of Chrysler's U.S. plants, including St. Louis Assembly Plants I and II. A. 39-89. At each plant, the Na-

tional Agreement is supplemented by a local agreement between Chrysler and the UAW local representing employees at that plant. A. 90-119. Under the agreements, seniority is on a plant-by-plant basis, and seniority at a plant prevails over corporate seniority. A. 39-119. Within Plant II, seniority is on a departmental basis. A. 94-95. Seniority at St. Louis Plant II determines shift preference, vacation preference, job assignments, and many other matters. A. 98-99, SA 201, 231-232. As one witness testified, "Seniority is everything." SA 231-232.

The National Agreement is based upon and geared to a two (2) shift production schedule. A. 72, 39-89, SA 93-94. Chrysler cannot change the work schedule without the Union's approval. SA 333-334, 345, 347, 683. This was demonstrated in 1989, when Chrysler asked Local 110 to vote to negotiate over a new work schedule at Plant II. SA 209-211. There is no evidence or proof whatsoever that the National Agreement or the Local Agreement, or any of their provisions, in any way were designed or intended to discriminate against Sabbatarians or any religion.

The National Agreement contains certain provisions which are of importance to this case, specifically:

1. *A negotiated no fault absenteeism policy, known as the Uniform Attendance Procedure.* This program was instituted in 1983 pursuant to an agreement between Chrysler and the UAW that absenteeism adversely affects quality and costs of production. A. 81-86, 164-171. The Uniform Attendance Procedure deals with absenteeism in two respects: (1) a six step procedure and (2) a chronic absentee procedure. This negotiated document speak to the problem of absenteeism and its effect on productivity:

> During these negotiations, the subject of absenteeism was examined at great length and in great detail. The parties agreed that absenteeism results

> in additional operating costs, adversely affects the efficiency of operations and quality, and places an unfair burden on those employees who regularly work as scheduled. A 81.
>
> * * * *
>
> As a UAW worker, you know what happens when people don't report for work. Production schedules are disrupted, an extra burden is placed on the dependable people who don't miss work, and the scurry to cover for absent employees has a negative effect. Even if absent workers are not paid wages for the days missed, a provision must be made to have someone cover their job. This may involve overtime and actually cost more than regular wages. Plus, any time people are shuffled around to cover absences, they resent having to leave their normal job and there is bound to be some loss of efficiency, and that costs money in the long run. More important, absenteeism undermines Chrysler' ability to compete with other auto makers, both domestic and foreign, and endangers the recovery Chrysler and the UAW lobbied so hard for and worked so strenuously to assure. . . . Your union contracts have been designed to provide you with vacation time, as well as ample time off for most needs and emergencies. A. 165.

Under the six step Uniform Attendance Procedure ("UAP"), employees who are absent seven times in a six month period, whether excused or unexcused, receive a written warning. Thereafter, each unexcused absence within a six (6) month period results in increasing levels of discipline ending in discharge (Step 2—written warning, Step 3—5 day layoff, Step 4—15 day layoff, Step 5—30 day layoff, Step 6—discharge). A. 83-84, 166-179.

The Uniform Attendance Procedure also contains a Chronic Absentee Procedure. Under this procedure, essentially any employee who is absent more than 20% of the time during the *regular* work week (Monday-Friday), regardless of whether the absence is *excused* or *unex-*

*cused*, is subject to discipline. If this level of absenteeism continues, the procedure calls for the employee's discharge. A. 84-86, 169-171. The National Agreement specifically notes in this regard that for employees with such a record, "it is agreed their irregular attendance prevents them from fulfilling the purpose for which they were hired, that is, as full-time employees. The parties agree that since such employees are unable to fulfill their obligation of regularly working as scheduled, their employment may be terminated under certain circumstances." A. 84. The discipline called for under the Uniform Attendance Procedure is negotiated, and (except for a 5 day disciplinary layoff) cannot be waived. A. 83-84. In fact, no provisions of the national or local agreement may be varied without the Union's consent. SA 636a-b.

2. *Specific provisions dealing with transfers between assembly plants within a specific geographic range of each other.* A. 63. The most pertinent provision deals with a procedure called "work opportunity." Under that procedure, if, for example, an employee is on layoff at Plant I and Plant II has positions available, the positions must be offered to laid off Plant I workers according to their seniority. A laid-off employee is given the option of taking the job—in which case he or she starts at Plant II with zero Plant II seniority, or refusing the offer —in which case the employee remains on layoff (with their Plant I seniority) awaiting recall at Plant I, but loses any right to continued unemployment benefits under the labor agreement. A. 63, SA 466-471. Surprisingly, in practice many workers at Plant I turn down this opportunity to work. Approximately 50-65% of Plant I workers rejected the chance to work at Plant II according to the testimony at trial. SA 468.

3. *A six step grievance and arbitration procedure culminating in arbitration before a neutral arbitrator.* A. 47-53, 87. The final step before arbitration is an Appeal Board, consisting of two representatives from the UAW

and two representatives from Chrysler. A. 49-50. At this step, Chrysler and the Union meet to discuss the grievance and their respective positions. It is the Union's grievance and therefore it is incumbent on the Union to pursue the grievance or propose changes. If the Union does not agree with Chrysler's position, it can proceed to arbitration or withdraw the grievance. The choice in either case is with the Union alone. SA 681.

**Chrsyler Plant II**

Chrysler opened St. Louis Assembly Plant II in the fall of 1983. SA 242, 251, 460. Beginning in late 1986 and since that time, the Plant produces the mini-van, the Company's most popular vehicle. SA 210, 463-464.

At Plant II, the Production Department ("Production"), including its Area Manager (John McFarland) and Line Supervisor (Robert Brinkley), is responsible for building and producing vehicles. SA 76-78, 463.

There are a number of different types of workers employed in Production at Plant II. Once a worker is assigned a job, he or she holds that job until electing to move elsewhere. Jobs are filled generally by seniority in practice. Production workers are assigned jobs at separate stations on the assembly line, where the employee performs certain designated tasks within less than one minute. For the vehicles to be built, someone must be at each station performing that job the entire time the line is running.

In addition to the workers on the assembly line, Chrysler also employs repairmen. These employees are assigned to a section of the line. Their job is to finish any job not completed by someone in the section, and to find and repair any defects in the work performed in that section.

Absences essentially are covered in one of two ways—floaters or temporary part time workers (TPTs). Floaters

are full-time production workers who work the same work schedule as regular production workers. They will fill-in for a worker when he or she is absent from the job. This may be for an entire day or for a short period, when for example the employee is using the restroom, seeing the doctor, or speaking to his or her Union representative. The number of floaters employed is based upon the levels of absenteeism experienced by Chrysler. SA 228, 480-483. The amount of manpower the Plant may authorize for a particular day is based upon job requirements and projected absenteeism. Thus, the number of people the Plant may call in for a particular day is based in part upon projected absences. SA 477-479. (The District Court found, as a matter of fact, that Chrysler would have to hire another full-time floater if a floater had been used to cover Cook's Friday absences on a regular basis. *Cook v. Chrysler Corp.*, 779 F. Supp 1016, 1021 (S.D. Mo. 1991)).

The labor contract also allows Chrysler to employ workers on a temporary basis ("TPTs") to handle absences on Monday or Friday, provided the worker does not work more than 120 days. These workers are paid the basic wage rate but receive no benefits. TPTs only may work on Monday or Friday. SA 228-229.

Labor Relations is a support function for Production. Labor Relations handles all contractual and equal employment matters for Production. SA 75-80, 462-463. For example, Labor Relations responds to all grievances. The Production supervisor merely accepts the grievance and delivers Chrysler's response as prepared by Labor Relations. SA 367-370, 191-209. Likewise, Labor Relations advises Production on discharge and disciplinary matters. SA 191-196. Discipline of employees was determined by Labor Relations, not the Supervisors. A. 613, 619. Despite Cook's implications to the contrary, it is clear that Labor Relations and not Production Super-

visors or Area Managers were responsible for handling this type of a personnel matter.

Although it may be difficult to believe in this economic climate, absenteeism was a significant problem at Plant II during the relevant time period. The workforce was relatively young and employees wanted time off. SA 474-476. From the time the Plant opened, Chrysler operated two shifts. With only occasional breaks, production workers were scheduled to work 9 or 10 hour days, 6 days per week, for the maximum period allowed by the National Agreement. With the Plant working a 6 day, 9-10 hour shift for a number of years, time off became even more valuable. As time went by, this steady overtime generated growing levels of absenteeism. SA 586-589, 608-610.

With the 1985 local contract, the number of job categories increased significantly, thereby reducing management flexibility to transfer workers and making absenteeism a greater problem. SA 224-225, 586-589, 608-610. In November, 1985, the local labor agreement was changed to provide a mechanism for employees, 30 days in advance of a scheduled work day, to sign up in a book (the "Book Procedure") on a first come, first serve basis for an excused day off. A. 180. The number of open slots each day per shift and department was negotiated, and the Union required that no employee abuse the procedure to the detriment of others. This was designed to avoid favoritism and give all workers an equal chance to obtain favored days off. SA 227, 641-643. Prior to that time, days off were granted by management in its discretion. This generated complaints of favoritism by employees, and the Book Procedure resulted to deal with this issue. The Book fills up fast on a Friday night. SA 626.

According to a number of witnesses, the absenteeism problem at Plant II was at its worst on Friday night. *E.g.*, SA 17-19, 475-476. Absenteeism on Friday night

was so bad that management often pulled all repairmen and other available workers (including supervisors) from regular jobs and brought in temporary workers to get the line started. SA 375-378. Often the line did not start on time. SA 480-487.

On Friday nights, the Plant called in a certain number of TPTs based upon its best projections for absenteeism. TPTs are hired simply by contacting by telephone people who have previously signed up on a call list, to see if they will work that evening. SA 475-487. If the person is not at home or declines to work, the next person is called until there is an appropriate complement hired for the day. SA 483-486. Openings on the line are filled first by floaters—who are assigned to the most difficult or error-prone of the open jobs—and the balance of the jobs are filled with TPTs. SA 375-378.

**Cook and Chrysler**

Cook started working for Chrysler in 1977 at Plant I. While on layoff in 1978, he took work opportunity to transfer to Plant II. III 8. When that plant had a layoff in 1979, Cook returned to work at Plant I. III 8. If he had not returned to Plant I, Cook would have had one of the highest seniority dates in Plant II. SA 20-22, 490-492.

Cook worked at Plant I until a major layoff in 1980 and was not recalled to work at Plant I until 1983. He worked at Plant I until his layoff in October 1985. SA 20-22, 490-492, A. 189-196.

Shortly *before* his 1985 layoff, Cook became a member of the Seventh-Day Adventist Church. He began to miss Friday nights. His absences were listed as unexcused, and he was at Step 1 of the Uniform Attendance Procedure when the layoff occurred. A. 189-196.

In January 1986, Cook received notice under the work opportunity procedure of the National Agreement that openings existed at Plant II, and that he could elect to

work at Plant II or remain on layoff and retain his Plant I seniority. Cook elected to report for work at Plant II knowing full well he lacked the seniority to work the first shift and therefore would be placed on second shift, missing every Friday night and facing discharge. A. 196-197, SA 55-56. By taking work opportunity, rather than remaining on layoff, Cook effectively exacerbated his scheduling problem, because he had no seniority at Plant II.

Cook reported for work and was placed on the second shift by virtue of his seniority. By virtue of his lack of seniority, he was assigned the line job of installing the jack and spare tire in the trunk of the vehicle. This was the only open job available in the section at that time. SA 372-374, 378. As with other jobs in the section, the job had to be completed properly in approximately 1 minute. SA 379-381. The other jobs in the section were held by production workers with greater seniority than Cook. SA 372-374.

Upon reporting, Cook advised Chrysler of his need to be off Friday night for religious reasons and gave management a letter requesting accommodation. Cook's immediate supervisor was Robert Brinkley, who in turn reported to area manager John McFarland. When Cook reported to Brinkley on second shift he gave Chrysler the same written letter requesting accommodation. Brinkley gave the letter to his Area Manager (McFarland) who in turn gave it to Labor Relations. Brinkley also referred Cook to his Union Steward for assistance and spoke to the Union Steward concerning Cook's situation. SA 384-385. The matter thereafter was handled by Labor Relations—specifically Labor Relations Supervisor Thomas Kallaos ("Kallaos")—and the Union.

After reporting, Cook began to miss work every Friday night. When he reached Step 2 in the Uniform Attendance Procedure (the last step before time off is assessed), Chrysler suspended any further discipline for over two months while it considered how to address the

accommodation request, even though Cook continued to miss work every Friday. SA 13, 285-287, 300-302.

Chrysler investigated Cook's request and attempted to explore alternatives. Kallaos considered the possibilities suggested by Cook and did not find any of them to be realistic or feasible. SA 301, 261-269, 289. He saw the only way to deal with the scheduling problem and still have Cook work the required hours like everyone else was for Cook to work first shift.

Kallaos investigated the seniority situation and found Cook could not hold first shift with his seniority. SA 273-274. As a practical matter, even at the time of trial over 3 years later, a person with Cook's seniority date lacked the seniority to hold first shift. SA 303-304, 497-504.

In his investigation, Kallaos also learned there were two other Seventh-Day Adventists at Plant II who had sufficient seniority to work the first shift. SA 276-277. These two workers were excused from working on Saturday, which is a premium pay day and therefore a day when absenteeism is not as serious a problem. SA 276-277.

Kallaos then spoke with Chrysler's EEO officer, Reggie Crocker ("Crocker"), in Detroit. Crocker advised Kallaos that Chrysler could not excuse Cook from work every Friday night and that he should determine if Cook could hold first shift. Failing that, Crocker suggested he ask the Union to allow Cook to work first shift. According to Crocker, at another Chrysler plant he had placed a Seventh-Day Adventist on the first shift unilaterally and that Union local had not objected. SA 275-282.

At Crocker's instruction, Kallaos then asked the Union President, Donald Woemmel ("Woemmel"), to allow Cook to work the first shift out of line of seniority. Woemmel flatly refused the request. A. 181, SA 328-329, 521-522. Kallaos then approached the Union's serv-

icing representative, Richard Burton, with this same request. A. 181. Burton also rejected the request. SA 181, 329.

Chrysler then advised Cook it would not excuse his Friday night absences, and that such an absence for religious reasons would be treated like any other *unexcused* absence. A. 132, SA 290. However, Chrysler allowed Cook to report to work late after sundown on Saturday night (an overtime shift when absenteeism is not as much of a problem). In essence, Chrysler permitted Cook to report to work late on Saturday night, but was unable to excuse his absences on Friday night. SA 275-282.

Cook continued to miss work. On Friday nights when Cook missed there were additional repairs on his regular job and the repairmen complained about the slow work and additional repairs. Jobs at his station either were not performed at all or not performed properly. Brinkley even fired one TPT who worked that job for poor performance. In addition, other workers told Brinkley that if Cook was getting off work Friday night, they wanted Friday nights off also. SA 382-384, 389. Thus, even though there may not have been any direct, provable "production loss" (i.e., a failure to produce *a* car in whatever shape) as a result of Cook's absences, there consequently were actual additional repairs and productivity problems on the job in question.

As he continued to miss work on Friday night, Cook's absences were treated like any other unexcused absence, and he was assessed discipline according to the Uniform Attendance Procedure. A. 172-179. Cook was able to use the Book Procedure to excuse more than one absence. A. 104; A. 126-127. His unexcused absences ultimately resulted in his discharge on September 18, 1986. A. 179.

The Union filed a grievance each time Chrysler imposed discipline against Cook pursuant to the Uniform Attendance Procedure. The Union and Chrysler addressed Cook's problem at each step of the grievance

procedure. SA 174-175.[1] Chrysler also discussed Cook's situation with a representative of the Adventist Church in an effort to resolve the matter, to no avail. At that meeting, the focus by the Church was on finding a way for Cook to hold first shift, not on any other type of accommodation. SA 176-180, 347-348.

The grievance proceeded to the Appeal Board level. The Union requested that Chrysler excuse Cook every Friday night and replace him with a floater (thereby adding another Union worker to the payroll). Chrysler did not accept this proposal. The Union then withdrew the grievance and declined to take it to arbitration. A. 38. According to the Union Appeal Board representative, John Guinan, he withdrew the grievance because he found no violation of the Uniform Attendance Procedure. Guinan Depo. at 45.

## SUMMARY OF REASONS WHY THE WRIT SHOULD BE DENIED

This is a straight-forward, fact-sensitive Title VII religious accommodation case which was decided by applying the statute and the Court's decision in *TWA v. Hardison* to the particular facts of this case. The District Court's factual determinations were affirmed on appeal. Both the District Court and Eighth Circuit decisions are consistent with *Hardison* and the applicable provisions of Title VII.

The petition represents little more than an attempt to obtain a second review of the factual determinations made below. The case has little application beyond its

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[1] This was consistent with the typical practice between the Union and Chrysler for employee discipline, as opposed to addressing the issues (as Cook suggests) at the time discipline was imposed by Chrysler. Cook's attempt to fault Chrysler for allegedly not discussing the accommodation question when discipline was imposed is misplaced since Cook had Union representation, and the grievance procedure is where such issues are discussed. Cook testified that he understood the Union was supposed to represent him and to communicate with Chrysler on the issue. A. 238.

particular facts. The lower courts appear to have little trouble applying *Hardison* or Title VII's religious accommodation provisions. Deciding the issues raised here by Petitioner will provide little guidance above and beyond that provided in *Hardison*. Resolving the issues will have little effect on the administration of justice as a whole because the case is so fact-sensitive.

The decisions below are not inconsistent with *Hardison*. The circuit "conflicts" alleged are more theoretical than actual. They are based upon language from decisions which are factually unrelated or factually distinguishable. Resolving the "conflicts" will not affect the outcome of the case in any event because the decisions also are based upon a factual finding of undue hardship. Conflicts between EEOC Guidelines and a Circuit Court decision are not a basis for certiorari review. Petitioner's factual arguments regarding disparate treatment are unfounded, and do not constitute special and important reasons for review.

## REASONS FOR DENYING THE WRIT

### Introduction

This is a simple, straightforward Title VII case. It was decided on the application of Title VII's religious accommodation provisions—as interpreted by this Court in *TWA v. Hardison*, 432 U.S. 63 (1977)—to the specific facts of the case. The District Court, applying *Hardison*, found as a matter of fact that Chrysler could not accommodate Petitioner without undue hardship and without incurring more than a *de minimis* cost. The Court of Appeals, applying *Hadison*, declined to overturn the District Court's factual findings.

Pared to their essential core, Petitioner's arguments are nothing more than an attempt to convince the Court that the lower courts wrongly decided the case on the facts and that a second review is warranted. However, that is not a proper basis for granting certiorari.

Certiorari jurisdiction is not for the purpose of giving the defeated party a second review of the district court's decision. Something more than just mere error must be alleged. Under the Court's Rules, "special and important reasons" are required to grant a petition for certiorari. Sup. Ct. R. 10. The Court does not "sit for the benefit of the particular litigants. . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1954) (citations omitted). Clearly, a case must involve issues of importance to the public or the administration of justice; as opposed to just the actual litigants.

As the following discussion explains, this case does not merit review based on the arguments raised by Petitioner. The Court of Appeals and the District Court applied Title VII's provisions to the peculiar facts of this case in accordance and consistent with the teachings of *Hardison*. Such factual decisions do not warrant further review. However, on even more basic grounds, the case is not suitable for certiorari review. In the 18 plus years since the *Hardison* decision the lower courts have successfully applied *Hardison* to a multitude of fact-sensitive cases. Since then, only in *Ansonia Board of Education v. Philbrook*, 470 U.S. 564 (1985), has the Court had occasion to look again in detail at the application of Title VII's religious accommodation provisions.

This case is no different than the dozens of other fact sensitive religious accommodation cases which have been decided in the lower courts since *Hardison*. It has little application or importance beyond the peculiar fact situation which exists in the Chrysler vehicle assembly plants. Resolving the "conflicts" and "errors" alleged will have little effect on the public (or even Sabbatarians) as a whole, since the case is so fact-sensitive. While clearly important to Petitioner and possibly of interest to other Sabbatarians who work for a union operation, deciding the issues raised here will provide little guidance beyond

that provided in *Hardison* and contribute little to the ability of the lower courts to interpret and apply Title VII, *Hardison* and *Ansonia*. For this reason alone, the petition for certiorari should be denied.

## I. THE COURT OF APPEALS AND DISTRICT COURT DECISIONS ARE CONSISTENT WITH THE TEACHINGS OF HARDISON AND DO NOT CREATE ANY REAL OR DIRECT CONFLICT BETWEEN THE CIRCUITS.

In a transparent effort to secure another factual review of the district court's decision, Petitioner goes to great lengths in an effort to convince the Court the decisions below in this case are inconsistent with *Hardison* and have created a direct and real conflict between the circuits. In fact, this is far from the case. Any "conflict" is far more imagined than real, and resolving the "conflict" will not ultimately affect the outcome of the case.

### A. The Court of Appeals and District Court Decisions Are In Accord with Hardison.

This case involves the application of the religious accommodation provisions of Title VII to the highly structured production environment of a unionized employer whose labor agreements cover virtually every aspect of production, scheduling, and employment. In this case, the labor agreements limited the flexibility and options to deal with a problem such as Cook's.

The Court of Appeals' and District Court decisions recognized and properly applied the principles developed by the Court in *Hardison* and its progeny. In *Hardison*, the Court found for the employer where the Sabbatarian employee lacked the seniority to work a shift which would not conflict with his religion, and the Union refused to allow him to work a shift out of line with seniority. In so holding, the *Hardison* Court refused to require TWA to "take steps inconsistent with the otherwise valid [collective bargaining] agreements." *Id.* at 79. According to the *Hardison* Court, "absent a discriminatory purpose,

the operation of a seniority system cannot be an unlawful employment practice, even if the system has some discriminatory consequences." *Id.* at 63. The Court also said:

> [T]o give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath.
>
> Title VII does not contemplate such unequal treatment. The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on limiting discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities . . . . It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preference of some employees, *as well as deprive them of their contractual rights,* in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.

*Id.* at 82 (emphasis added).

The *Hardison* Court further held that requiring "TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship." *Id.* at 84. In so holding, the Court specifically rejected the Eighth Circuit's suggestions that (a) Hardison be allowed to work a four day week while others worked five days, and (b) Hardison be replaced with a supervisor or a qualified person from another department. *Id.* at 84. The *Hardison* Court noted that "[b]oth of these alternatives would involve costs to TWA, either in the form of lost efficiency in other jobs or higher wages." *Id.* at 84. The Court also noted that

> [b]y suggesting that TWA should incur certain costs in order to give Hardison Saturdays off, the Court of Appeals would in effect require TWA to finance an additional Saturday off and then to choose the

> employee who will enjoy it on the basis of his religious beliefs. While incurring extra cost to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs.

*Id.* at 84-85.

In his treatise on employment discrimination, Professor Larson likewise stresses that the interest of co-workers in not being discriminated against "on grounds that were ultimately religious" is a key factor to the *Hardison* decision. Otherwise, he suggests, accommodating Hardison at more than a de minimis cost would mean TWA would pay a cost for Hardison to take a day off which it would not pay for another worker. 3 A. Larson, *Employment Discrimination* § 92.12(a)-(b) p. 19-37 (1992).

*Hardison* provides clear guidelines for resolving religious accommodation cases that are just as relevant today as they were over 18 years ago. Contrary to Cook's suggestion to the Court, the District Court did nothing more than apply *Hardison* to the particular facts of this case. From a careful reading of the opinion, it is clear the District Court found, as a matter of fact and law, that (1) accommodating Cook's request to miss work every Friday night by moving him to the first shift out of line with his seniority and without the Union's consent was not required by *Hardison*, and (2) accommodating in any other manner Cook's request to miss work every Friday night would cause undue hardship for Chrysler, including lost efficiency and quality, and additional costs which were more than *de minimis*. *Cook*, 779 F. Supp. at 1023-1024. On appeal, the Eighth Circuit refused to overturn, as clearly erroneous, the District Court's conclusion that accommodating Cook would result in more than a *de minimis* cost to Chrysler. The Court also stated that accommodating Cook would compromise other employees' contractual rights. *Cook v. Chrysler Corp.*, 981 F.2d 336, 338-339 (8th Cir. 1992).

Neither decision is inconsistent with the teachings of *Hardison* outlined above. Under *Hardison*, employers do not have to allow the employee to work only 4 days a week when everyone else is working 5 days a week if this would result in additional costs or lost efficiency. This is essentially what Cook asked for in this case—to work 5 days out of 6 and be replaced by someone else on Friday night—since Chrysler does not run the assembly line on Sundays and the only Sunday work is in high seniority jobs at premium rates. However, the District Court found as a factual matter that allowing Cook to work a different schedule and fewer days than the 3,000 other workers at Plant II (including a prized day off every Friday) would result in additional costs and lost efficiency to Chrysler. This included the $1,578 cost of benefits lost yearly by Cook missing one day per week, the more than $5,000 in plant costs per employee lost yearly by a Plant II worker missing one day per week, the costs of additional repairs and warranty claims from absenteeism, the cost of hiring a TPT and/or additional floater, and loss of quality and efficiency. The Court of Appeals reviewed this finding and refused to overturn it. A further explanation of the underlying facts would be helpful to understand these rulings.

At Plant II, "Seniority is everything" for a production worker. SA 231-232. It determines shift, vacation, job, layoff, etc. Any exception to the contract condoned by Chrysler is used by the Union to secure the same advantage for others. SA 621-623, 645, 665.

Cook's accommodation request placed Chrysler in an untenable position. The scheduling system was based upon a five day work week, with a day and evening shift. All the labor agreements were based upon and geared to a two-shift operation and starting times and quitting times for shifts are spelled out in the National Agreement. SA 205, 33,334, 345-347, 656. Shifts and schedules could not be changed without Union agreement. Shift preference

was based solely upon seniority. A. 98-99. The same benefits were paid regardless of how many hours were worked. A. 183 (Woemmel). Since benefits were set regardless of whether the employee worked 40 or more hours, it clearly was more economical for Chrysler to work an employee up to the maximum hours allowed by contract. Chrysler lost that efficiency when an employee did not regularly work the full schedule. To make matters worse, Friday night was a prized day off for employees. SA 626. Employees became angry if someone got off on Friday night more than others. SA 667.

The alternatives proposed by Cook in his January 17, 1986 letters were not feasible. A. 162. The work schedule could not be varied except by agreement. SA 210-11, 345, 347. Placing Cook on the first shift out of line of seniority violated the seniority rights of other workers. Voluntarily swapping shifts also would not work. Employees do not own their seniority, and cannot trade it as they see fit. An employee can displace anyone (even Cook, if he were on first shift) on the first shift, even for one night, if he has greater seniority than that person. SA 265, 634, 654.

Excusing Cook every Friday night similarly would contravene the labor agreement, which generally calls for the discharge of an employee who is absent 20% or more of the time (with certain exceptions for non-recurring situations), whether excused or unexcused. A. 84-86, 169-171. A 20% absenteeism rate is equivalent to missing one shift per week. Numerous other employees have lost their jobs for missing the same amount of time as Cook would have missed if he were excused. SA 668-673.

The type of routine excused absence contemplated by Cook's situation is a far cry from a casual absence, which Cook uses to justify excusing him also. Examples of excused absences cited by Cook—such as illness, workers compensation, jury duty, union business, etc.—all deal with situations which are non-recurring or non-permanent types of absences. They also do not raise

Establishment Clause concerns. Cook's request, however, was a request to be excused *every* Friday night on a permanent, ongoing basis. It therefore cannot be equated with a casual type absence.

Excusing Cook every Friday night also essentially creates another allowed slot for the Book above that negotiated. The Book Procedure operates on a first come, first serve basis. The number of slots available for any day is limited, and no employee can routinely sign up for the same day off. A. 180. This latter limitation was added to the contract to avoid favoritism and ensure that *all* employees had a chance at getting preferred days off. SA 616, a, b, 639-640. Thus, when the Book Procedure took effect in November 1985 (A. 180), Chrysler no longer could favor the request of any one employee. Instead, all employees received equal treatment. To allow Cook to be excused every Friday night therefore would directly conflict with the Union's request that prized days off—and Friday night clearly was such a time—be allocated equally.

Given these facts, it becomes readily apparent that to excuse Cook every Friday night would contravene the applicable labor agreements and give Cook a benefit not accorded to any other production worker. Moreover, it would allow Cook to work less than the regular schedule for his fellow workers—a result *Hardison* squarely rejected when it refused to allow Hardison to work a 4 day rather than a 5 day week as the appellate court had suggested.

Since the evidence showed that numerous other employees wanted Friday night off, this was a likely problem—another concern recognized in *Hardison*. *E.g.*, SA 626, 648. Essentially, Cook would be able to miss work at a level of absenteeism which would result in discharge for any other worker. As *Hardison* clearly states, such unequal treatment is not required by Title VII, and indeed contradicts the statute's intent. Rather than serving as a shield from Title VII, the collective bargaining agree-

ments merely ensured equal treatment based on neutral criteria and set the parameters for the costs which must be incurred. However, an organized employer should not be condemned for being unaccommodating (or treated like a non-Union employer with considerable discretion), just because the labor contract has restricted his options.

Consequently, it is readily apparent that the courts below were faced with a factual situation similar to *Hardison* and applied *Hardison* to those particular facts. The holdings are entirely in accord with *Hardison*.

**B. Any Alleged "Conflict" Between The Circuits Will Not Affect The Outcome.**

In his quest for a cert-worthy conflict, Petitioner searched in detail the opinions below and those from other circuits for some common theme. The alleged conflicts produced from this search appear to be: (1) whether the existence of a labor contract excuses the employer from engaging in an accommodation effort, (2) whether a non-discriminatory labor contract itself constitutes a reasonable accommodation, and (3) whether all, or only seniority, provisions of a labor contract can be used as a shield against a religious accommodation request. Petitioner's Brief 11-21.

In pressing these arguments, Petitioner conveniently fails to point out a fundamental fact—the effect the Court's resolution of these issues will have on the outcome of this case.

In fact, resolving these questions raised by Petitioner will not effect the outcome at all. These questions do not in any way address the District Court's finding, as upheld by the Court of Appeals, that excusing Cook every Friday night would result in more than a *de minimis* cost to Chrysler. That finding is determinative for the entire case. It is one of the two bases upon which the Eighth Circuit distinguished one of its prior decisions. Petitioner's arguments only deal with the other distinction.

This is clear from the Eighth Circuit's opinion. In that opinion, the Court of Appeals first held that under its opinion in *Brown v. General Motors Corp.*, 601 F.2d 956 (8th Cir. 1979), "differential treatment resulting from accommodation runs afoul of section 2000(e)-2(a)(1) if it 1) compromises other employees' seniority rights as secured by a collective bargaining agreement, or 2) confers a privilege, the cost of which is more than *de minimis*, solely on the basis of the recipient's religious beliefs." *Cook v. Chrysler Corp.*, 981 F.2d 336, 338 (8th Cir. 1992). The *Cook* Court then proceeded to explain how both of these situations apply—contract rights and *de minimis* costs. Petitioner's "conflicts" do not in any way deal with the latter issue. Consequently, even if the Court were to resolve the "conflict" issues in Cook's favor, the decision would still stand.

### C. The Decisions Below Are Not In Direct Conflict With Other Circuit Decisions.

Try as he might, Cook's quest to create a conflict based on the issues cited in II above does not create a direct, as opposed to a probable, conflict of any substantial importance, much less one which is worthy of review. There are several reasons for this:

1. Hardison states very clearly that an employer is not required to take steps "inconsistent with" an otherwise valid collective bargaining agreement. *Id.* at 79. There is no question that the collective bargaining agreements at issue were not intended or designed with a purpose to discriminate against Sabbatarians or other religious groups. Accordingly, *Hardison* teaches that Title VII does not require the employer to act inconsistently with the agreements, particularly if it would result in more than a *de minimis* cost—which is the case here. Clearly, the decisions below are entirely in accord with this conclusion.

2. The alleged conflict between the Eighth Circuit decision in this case and the Fourth Circuit's decision in

*EEOC v. Ithaca Industries, Inc.*, 849 F.2d 116 (4th Cir. 1988) is illusory. *Ithaca* does not on its face appear at all to deal with the accommodation issue in a unionized setting. There is no evidence a collective bargaining agreement was involved, that a labor agreement precluded accommodation, or that Ithaca was in any way precluded from working out an accommodation. The *Ithaca* Court clearly did not decide the same issue which is in dispute here. The two cases are thus clearly factually distinguishable and cannot be considered as creating a direct conflict on an identical issue.

3. *Smith v. Pyro Mining Co.*, 827 F.2d 1081 (6th Cir. 1987), likewise does not appear to be in direct conflict with the decisions below. Once again, there is nothing in the opinion to indicate that Smith was a union employee governed by a collective bargaining agreement which restricted his employer's flexibility in dealing with the situation. The case appears to only involve a self-imposed company policy. Pyro allowed for voluntary swaps, whereas the labor contract in this case did not authorize persons to swap shifts and gave every worker the right to work a shift, even for a day, instead of a worker with lower seniority. Unlike *Cook*, there also was a finding that *Pyro* failed to prove accommodation would pose an undue hardship.

4. Cook exaggerates the nature and impact of the Court of Appeals' conclusion that the labor contracts provide a reasonable accommodation. The language cited by Petitioner from *Johnson v. Angelica Uniform Group, Inc.*, 762 F.2d 671, 674 (8th Cir. 1985), is mere dicta. The Court of Appeals in *Cook* merely said that the labor contracts—which provide for shift and vacation preference based upon seniority, allow each employee a certain number of days off, and allow employees to sign up for time off on a first come, first served basis without reference to seniority—provided *an* accommodation of Cook's beliefs. 981 F.2d at 339. The *Cook* Court nowhere, said it was the sole accommodation necessary. Indeed, Petitioner

recognizes his construction of the Eighth Circuit's opinion is one of "implication." Petitioner's Brief at 18. Not only is this "implication" several steps afield from the Court's actual opinion, but such implications do not rise to the level of a direct and clear conflict.

5. What Cook is really trying to say is that Title VII requires an employer to actively attempt to accommodate an employee with a religious scheduling problem, and if he fails to do so, a Title VII violation occurs even if the employer proves undue hardship. This strained construction of Title VII is not consistent with the language of the statute, or *Hardison* and *Ansonia*.

6. Petitioner cites several cases for the proposition that *Hardison's* application is limited to seniority provisions of a collective bargaining agreement and that an employer may not rely on non-seniority provisions of a labor contract to excuse a failure to accommodate. Petitioner's Brief at 15. He then claims the Eighth Circuit's decision below is in conflict with this construction. Once again, the cases he cites are inopposite. The decisions cited deal with an employee's refusal to pay union dues and the union's refusal to waive the union seniority clause in a labor contract to accommodate the refusal. The cases do not involve an employee scheduling problem. None of the defendants in those cases were able to prove undue hardship. The issues are entirely different because the costs and implications associated with these different accommodation questions are entirely different. These decisions hardly are in direct conflict with the ruling in this case on a different issue and set of facts.

* * * *

Petitioner has blown the Eighth Circuit's reference to collective bargaining agreements totally out of proportion. The Court below merely held that Chrysler did not have to take steps inconsistent with an otherwise valid collective bargaining agreement to accommodate Cook. That is entirely consistent with *Hardison*.

## II. ALLEGED CONFLICTS BETWEEN A CIRCUIT COURT DECISION AND EEOC GUIDELINES DO NOT PROVIDE A BASIS FOR CERTIORARI REVIEW.

Petitioner appears to argue that the Courts below failed to follow the EEOC's Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1-1605.3, by not looking at the relative cost to Chrysler of accommodation and/or requiring Chrysler to show the magnitude of the hardship.

The Court did not give these Guidelines the force of law in *Ansonia*. In fact, the Court noted in *Ansonia* that "EEOC guidelines are properly accorded less weight than administrative regulations declared by Congress to have the weight of law." 479 U.S. at 69 n.6.

Such a conflict is not a recognizable basis for certiorari review. Supreme Court review is not necessary to resolve conflicts between EEOC "Guidelines"—which are not administrative regulations authorized by Congress—and a litigated decision by a Circuit Court of Appeal. This is particularly true since the Guidelines are not binding precedent on any party.

In any event, the Guidelines cannot be squared with *Hardison*. TWA was no less a large employer than Chrysler, yet paying premium wages to one employee was considered more than a *de minimis* cost. *Hardison* does not limit *de minimis* costs to premium wages. The costs of accommodation cited by Chrysler were proven specifically in part—$1,578 in lost benefits per year, over $5,000 in lost plant costs per year—and were certainly as signicant as in *Hardison*. Moreover, in addition to *de minimis* costs, *Hardison* spoke of "lost efficiency" without requiring any quantification. 432 U.S. at 84. Here, Chrysler demonstrated lost efficiency and quality. Apparently, Petitioner would require Chrysler to lose significant dollars in relation to its net worth, before finding undue hardship. The *de minimis* cost ruling of *Hardison*

—clearly issued with an eye to constitutional establishment clause concerns—requires no such proof. Indeed, the statute itself requires no proof of quantifiable undue hardship in monetary terms.

## III. COOK'S FACTUAL ARGUMENTS REGARDING THE ALLEGED ACCOMMODATION OF ANOTHER SABBATARIAN AND EXCUSING CASUAL ABSENCES PROVIDES NO BASIS FOR CERTIORARI REVIEW.

In a final effort to secure Court review, Petitioner abandons all pretense of reliance on the standards and rules for certiorari review and launches into a wholesale discussion of the facts of the case; particularly the types of absences Chrysler excuses and the alleged accommodation of another Adventist. Even though this incursion into the facts is ample proof that no basis for certiorari review is presented, some response is necessary to preserve the record.

Cook mistakenly relies on the paid absence allowances ("PAA") offered contractually to all employees to prove his point. He is factually mistaken. PAA's are not additional days off, as Cook appears to suggest to the Court. Instead, PAA days relate to a provision in the contract which entitles each employee 5 paid days per year to cover absences from work, regardless of whether those absences are excused or unexcused. A. 77-80. However, just because an employee uses a PAA to cover a missed day from work, there was no evidence this means the absence will be treated as excused for purposes of discipline or the attendance procedure. Under the chronic procedure, excused or unexcused absences count towards the 20% absence test regardless of whether the employee is paid for the day off, using a PAA day.

Saying Cook could have been accommodated by using his PAA days and then a floater to replace him when he was absent not only reargues the facts, but is a fruitless suggestion. With only 5 PAA days per year, Cook would

not be entitled to this benefit for very long. Moreover, this would allow Cook to be absent more times than allowed by the Chronic Absentee Procedure as well as entitling Cook to receive full benefits without working full time. In fact, Cook used up all his PAA days and his vacation time before his discharge. Unlike *Ansonia,* where only several extra days were involved, Cook required one day off per scheduled work week.

Likewise, Mr. Williams' experiences at Chrysler as a Sabbatarian are not relevant to this case. There are several reasons for this.

First, Cook specifically told the Union *not* to use Williams' case to assist him in getting off work. He asked the Union *not* to get Williams involved and to keep Williams out of the case entirely. SA 59-60.

Cook therefore took from the Union's arsenal a weapon he now uses to support his case. It indeed is ironic that Cook as an afterthought uses Williams to support his case now when he failed by his own choice to use Williams at a time when it could have done him the most good. It indeed is ironic that Cook later criticized the Union's representation efforts when he took a key precedent out of their hands.

Second, the circumstances under which Chrysler allowed Williams to be absent on Friday night are totally different from Cook's case. Williams worked in the Paint Department, not the Trim Department where Cook worked. In 1984 and 1985, absenteeism was not a problem because employees previously had been laid off for a long time and were working, and the Plant worked under a model contract where fewer classifications allowed for greater flexibility. SA 584-605, 608-609, 613. In 1984 and 1985, Paint had excess manpower. Williams' request was not a problem because they needed people to go home. SA 584-605.

The situation was far different in 1986. The 1985 labor contract increased the number of job classifications, thereby making the effect of absenteeism on operations

more significant. In an effort to reduce costs, Chrysler cut manpower on the rolls, thereby reducing available manpower. SA 608-609. Finally, the steady 6 day, 9 hour day schedule had taken its toll. By 1986, absenteeism had increased and become more of a problem. SA 586-588, 605-609. For the first time at Plant II, Chrysler also began to enforce the Uniform Attendance Procedure and administer it the way it was intended. SA 252.

Even more importantly, the local labor agreement which took effect in November 1985 changed how Chrysler granted time off to workers. Under the agreement, SA 586-588, 608-609, Chrysler no longer could decide who could get off a particular day. The Book Procedure specifically prevented any employee from repeatedly getting off one day a week and took away discretion from the Supervisors. SA 586-588, 252, 616 a-b, 640-641. As a result, Chrysler no longer could continuously allow Williams to be off on a day which others also wanted off.

After May 1986, Williams used the Book procedure and his seniority to remain employed and eventually hold first shift. He then was able to be accommodated within the confines of the labor agreements. Williams' case thus shows that a Seventh-Day Adventist can be accommodated at Chrysler within the confines of the contract. That also holds true for the two Adventists with seniority to hold first shift who are excused on Saturdays and were still employed.

Given these reasons, Williams' situation bears no relevance to this case and should be disregarded.

Finally, the Court should disregard Cook's attempt to equate Cook's absences with "secular" absences. Chrysler has found ways to deal with absenteeism because it is a problem it must deal with, not because it is accommodating people. Cook and any other workers may be absent up to a certain point, without penalty, then discipline is imposed.

Cook used his vacation just like everyone else. However, the other absences cited by Cook are for non-recurring problems and/or are negotiated. In contrast, excusing Cook amounted to a permanent Monday-Thursday, and Saturday work week with its attendant costs and adverse affects. This is a different work week and schedule than everyone else, based solely on religion. The two situations are totally different.

## CONCLUSION

For all of the foregoing reasons, Cook's petition for certiorari should be denied.

Respectfully submitted,

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